Westin Hotels Corporation d/b/a The Westin Hotel *and* Lee Ann Maniaci. Case 7-CA-15920

22 August 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 9 March 1983 Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Westin Hotels Corporation d/b/a The Westin Hotel, Detroit, Michigan, its officers, agents, successors, and assigns, shall pay Lee Ann Maniaci the sums set out in the said recommended Order.

[1] In adopting the Administrative Law Judge's conclusion that Respondent has not shown that Lee Ann Maniaci incurred a willful loss of interim earnings during the backpay period, we do not rely upon his finding that Maniaci sought employment through her union. It is also noted that Maniaci did not "repeatedly" visit a half dozen places before obtaining her first job. She did contact a half dozen establishments during this time, however, and repeated these contacts as well as initiated new contacts throughout the entire backpay period when not working.

SUPPLEMENTAL DECISION

ROBERT W. LEINER, Administrative Law Judge: This backpay matter was tried in Detroit, Michigan, on November 3, 1982, pursuant to a backpay specification and notice of hearing, issued by the Regional Director for Region 7 of the National Labor Relations Board, on February 12, 1982. Thereafter, Westin Hotels Corporation d/b/a The Westin Hotel,[1] herein Respondent, by counsel, filed a timely answer wherein it admitted and denied various and several allegations of the backpay specification. At the hearing, however, Respondent admitted several of the allegations which had previously been denied, leaving for resolution only the question of whether the discriminatee, Lee Ann Maniaci, made reasonably diligent efforts in her search for interim employment during the backpay period, or, whether, on the contrary, she incurred a willful loss of earnings by virtue of a failure to search for work thus failing to support her duty to minimize the backpay obligation of Respondent.

[1] The name of Respondent in this proceeding appears as corrected at the hearing. The Board Order in the underlying unfair labor practice case, issued *pro forma*, runs against the Western Renaissance Corp., d/b/a Detroit Plaza Hotel.

FINDINGS AND CONCLUSIONS

I. BACKGROUND

On March 4, 1980, Administrative Law Judge Thomas D. Johnston issued his Decision in the underlying unfair labor practice case in which he found, *inter alia*, that Respondent, operator of a hotel and bar employing cocktail waitresses in downtown Detroit, Michigan, on December 22, 1978, unlawfully discharged claimant Maniaci. Thereafter, upon Respondent failing to file timely exceptions to Administrative Law Judge Johnston's recommended Order, the Board, on April 8, 1980, issued its Order adopting, *pro forma*, the decision of Administrative Law Judge Johnston and directing Respondent to take the action set forth in the aforesaid recommended Order.

On November 30, 1981, Respondent entered into a stipulation with the General Counsel of the National Labor Relations Board in which, *inter alia*, it stated that it had no objections to the Board's Order of April 8, 1980; agreed that the parties had been unable to reach agreement on the amount of backpay due to Lee Ann Maniaci under the terms of the Board's Order; and agreed, in any event, that following the report of an administrative law judge after a backpay hearing, if there should be any review, the only issue before a judicial inquiry would be the validity of the backpay determination.

Pursuant to prior notice, the above hearing was held at which all parties were afforded a full opportunity to be heard, to present evidence on the issues, to argue orally, and to present post-hearing briefs. Upon consideration of the entire record, including the timely post-trial brief of Respondent, I make the following:

FINDINGS OF FACT

Respondent admits and I find that the gross backpay due the discriminatee, Maniaci, occurs in the six-quarter backpay period December 22, 1978 (when Respondent unlawfully discharged her), through March 17, 1980, when, it was stipulated, Respondent tendered (and Maniaci refused) an offer of reinstatement to an equivalent position of employment. By computation on the basis of the calendar quarters during that period and taking into consideration the average weekly hours worked by a representative group of employees within Maniaci's job classification, and including the tips and meal allowances which Maniaci would have earned and to which she would have been entitled during the backpay period; and with due regard for the interim earnings earned by Maniaci during the backpay period, the net backpay was de-

termined to be $8,114.57.[2] Respondent takes issue only with the failure of Maniaci to seek and obtain further employment during the backpay period and thereby diminish further Respondent's obligation of backpay to Maniaci.

Maniaci's Testimony With Regard to Her Seeking Employment During the Backpay Period

Maniaci, at all material times, has lived in Fraser, Michigan, a suburban community about 25 miles from Detroit. She lived there while employed by Respondent; she lived there during the backpay period; she continues to live there. She was employed for about 20 months as a cocktail waitress by Respondent. She has had no experience in that job, or in any other job, in the service of food. She was also employed at a prior job as a cocktail waitress for 13 years prior to her employment by Respondent.

Respondent unlawfully terminated her on December 22, 1978. That same evening, she commenced her search for interim employment. The record shows that she visited various cocktail lounges and other places of employment for the service of drinks in or about the suburban Detroit area within 8 to 10 miles of her home. She was refused certain jobs where there was no employment and, in April 1979, she in fact worked for 2 days at a bar where, after spending $60 for a uniform and shoes, the working conditions were so poor that she quit (water drains backed up requiring her to walk in water).

Meanwhile, in January 1979, she registered with the Michigan Employment Security Commission as a cocktail waitress, re-registered there and appeared there from time to time in order to secure unemployment compensation. On those occasions, she had informal conversations with agents of that Commission to determine if they knew anything of job openings. According to her credited testimony, these agents told her that they knew of no such openings. In short, the record shows that, in 1979, she repeatedly visited about half dozen establishments before she gained employment with a cocktail lounge, Three Faces, Inc., where she worked as above noted, for about 2 days but quit because of bad working conditions. Thereafter, in the second quarter of 1979, she worked for the Georgian Inn in Roseville, Michigan. She was fired from that job because the employer discovered that, as a part-time employee, she was collecting unemployment compensation from her prior employer. The discharge occurred at the end of June 1979. In the fourth quarter of 1979 and through the first quarter of 1980 to the end of the backpay period (stipulated as March 17, 1980) Maniaci was fully employed by the Shore Point Motor Lodge in St. Clair Shores, Michigan.

Maniaci also sought employment through her union but ceased that effort when union efforts proved only lukewarm in finding her a job.

Maniaci admits that she did not seek employment in any of the hotels in Detroit because she feared, if not a Respondent blackball, an inability for her to successfully explain why she was discharged, resulting in employer relunctance to hire her in those jobs. She did not seek employment from them because, as she said, she believed that in the future she might seek employment from them after the unfair labor practice matter had been fully rectified in her favor and she feared the effects on the possibility of future employment of any intermediate rejection. In addition, she testified that she was unable to commute to Detroit as she had done while employed by Respondent because of the expensive breakdown of her car and her inability to secure other than public transportation to Detroit. This factor, considering the late working hours, made downtown Detroit an unattractive immediate alternative to her. She also testified without contradiction that she did not seek employment at any of the cocktail lounges in Detroit, as opposed to hotels, because of her own knowlege of them, all of them required food service experience which she did not have.

As its only witness, Respondent called Richard Elliott, an agent for the Michigan Employment Security Commission who identified Commission records (Resp. Exh. 1) showing the existence of dozens of jobs for "waiter/waitress, bar" during the backpay period in the seven suburban counties in and around Detroit, Michigan. Elliott, however, admitted that he did not know where the jobs might have been located in these suburban counties and further admitted that he did not know whether any or all of them were 100 miles or more from Maniaci's abode. Maniaci's credibly testified that she knew nothing of such a listing and that no Commission agent told her of such records or of such jobs.

Discussion and Conclusions

Respondent having admitted the *prima facie* validity of the backpay computation, the underlying formula, and the net backpay of a major fraction of the alleged $8,114.57 plus interest, and alleging only a dimunition of Respondent's obligation for any or all of that sum based on Maniaci's failure to exercise reasonable efforts to secure interim employment, Respondent failed to introduce any evidence in support thereof. As noted in *Sioux Falls Stockyard Co.*, 236 NLRB 543, 545 (1978), the burden is on Respondent to establish its affirmative defenses including the obligation to show that Maniaci did not make a *bona fide* effort to seek employment and was therefore willfully idle, *Aircraft & Helicopter Leasing & Sales*, 227 NLRB 644, 646 (1977); *NLRB v. Mooney Aircraft*, 366 F.2d 809, 815 (5th Cir. 1966), and Respondent does not meet that burden by presenting evidence of a lack of employee success in the gaining of interim employment or low interim earnings. Rather, Respondent must affirmatively demonstrate that the employee neglected to make reasonable efforts to find interim work, *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575-576 (5th Cir. 1966). The alleged discriminatee must make only "reasonable efforts to mitigate the loss of income and not undertake the highest standard of diligence," *NLRB v. Arduini Mfg.*, 395 F.2d 420, 422-423 (1st Cir. 1968). Here, the evidence shows that in Maniaci's efforts to gain interim employment, commencing on the very night she was discharged, some successful, some

[2] This net backpay calculation is a figure derived for the period ending March 30, 1980, the date alleged in the backpay specification as the final day of the backpay period, rather than March 17, 1980, the date stipulated by the parties at the hearing to be the last day of the backpay period.

unsuccessful, she did all that the law requires: a good-faith effort, *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). In determining the reasonableness of this effort, the employee's skills and qualifications must be taken into account, *Mastro Plastics Corp.*, 136 NLRB 1342, 1359 (1962). Thus, the existence of jobs requiring food service experience is immaterial. Also, since Maniaci's efforts span the entire backpay period, the record as a whole demonstrates that she diligently sought employment during that period. *Saginaw Aggregates*, 198 NLRB 598 (1972). Even though a lack of diligence will not be found merely because there was no search for interim employment in each and every quarter of the backpay period, Maniaci did search for employment in every quarter. Indeed, Maniaci sought interim employment instantly upon her unlawful discharge, a demonstration of diligence specifically not required by law. *Saginaw Aggregates, supra.*

The principal arguments upon which Respondent relies to demonstrate Maniaci's failure to exercise due diligence in seeking interim employment are: (1) the failure of Maniaci to seek hotel work in metropolitan Detroit; and (2) her failure to take advantage of the jobs listed by Michigan Employment Security Commission. With regard to the first position, Respondent concedes that there were only five applicable hotels in downtown Detroit and it does not follow that because Maniaci failed to seek employment in the city of Detroit that she failed to make the legally necessary diligent effort by seeking employment in the area more closely surrounding her abode. This is not only true in view of the breakdown of her automobile, the working hours peculiar to the job, and the lack of nighttime public transportation, but there is no proof on this record either that the Detroit hotels had actual available jobs or that there was a lack of jobs in the suburban Detroit area compared to downtown Detroit.[3] The failure to seek jobs in the downtown Detroit area, where the employers are few, does not lead to the conclusion that Maniaci, by searching for jobs in suburban Detroit, was not making a good-faith effort for discovering interim employment. I necessarily reject, however, Maniaci's alternative argument that, under the circumstances of her being discriminatorily discharged, she could reasonably feel that a search for employment in the Detroit hotels, before Board vindication of her rights, might reasonably put her at a disadvantage should she seek subsequent employment after a Board Order. As Respondent accurately argues in its brief, such a position would insulate a discriminatee from the obligation to search anywhere for interim employment prior to Board vindication. This is therefore not a persuasive legal argument for Maniaci notwithstanding she could reasonably believe that a prospective employer would be reluctant to hire an employee discharged for union or protected activities.

With regard to Maniaci's failure to take advantage of any of the jobs listed by the Michigan Employment Security Commission, (1) there was no showing that she was apprised of the existence of any such listing by any agent of the Michigan Employment Security Commission or by any other source. Maniaci denies knowledge of the list. I credit the denial. Furthermore, I credit her testimony that she did request from agents of the Commission their knowledge of existing jobs when she appeared to collect her unemployment compensation. (2) Moreover, as noted above, there is no showing that any of these jobs on the list existed within 100 miles of her abode. She would be under no obligation to travel a total of 200 miles a day, perhaps at night, in order to seek interim employment even if she were aware of the listing.

Respondent (br., p. 3, *et seq.*) also argues that Maniaci's apparent pattern of making "three inquires [sic] per month for interim employment is insufficient to show due diligence. That position is legally without merit, *Mercy Peninsula Ambulance Service*, 232 NLRB 1070 (1977), and cases cited *supra.*[4]

Lastly, Respondent argues that, regardless of Maniaci's failure to seek hotel employment in downtown Detroit, she unduly restricted her search for interim employment by looking only within 10 miles from home whereas she had actually work 25 miles from her home when working for Respondent in Detroit. In support, Respondent cites *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1216 (1962) (Adamson). That case, in which the Board disallowed backpay to the claimant, is of no help to Respondent since the discriminatee there moved from a heavily populated area (at the time of the commencement of the backpay period) to one or more small towns where there were substantially fewer work opportunities; hence, a search for work under those circumstances was likely to bear little fruit. Here, Maniaci did not move to a small town from her suburban Detroit abode and, furthermore, there is no proof that there were fewer jobs available in suburbia, even within 10 miles of her abode than in Detroit. To the contrary, Respondent sought to prove exactly the opposite (Resp. Exh. 1). Whether Maniaci knew of these jobs, whether they were within 100 miles of her home, and whether she could reasonably reach them are clearly other matters. That Maniaci should have been more diligent in her search is clearly arguable. In view of the number of suburban jobs, Maniaci's particular work experience and her actual search, I cannot find a willful failure through a lack of diligence because her search was limited to a 10-mile radius.

I therefore conclude that Respondent has failed to support its burden of proving a Maniaci failure to make reasonably diligent efforts to seek interim employment. Accordingly, I hereby issue the following recommended:

[3] To the extent Respondent requests (br., p. 16) that judicial notice be taken of the number of cocktail waitress jobs in Detroit in the backpay period because of "the well-known and characteristic high turnover of bar waitresses." I do not believe the doctrine of judicial notice (or its administrative law analogy) applies to or substitutes for proof of the turnover in cocktail waitresses. If it did I would be impressed with Maniaci's seeking employment only within 10 miles of her abode on that theory rather than in downtown Detroit.

[4] To the extent that *NLRB v. Mercy Peninsula Ambulance Service*, the correct citation of which is 589 F.2d 1014 (9th Cir. 1979), denied enforcement of the Board's Order in 232 NLRB 1070, I am, of course, bound by the Board's view. *Iowa Beef Packers*, 144 NLRB 615 (1963). The court of appeals held that three attempts per month were insufficient to show due diligence. The case, however, is clearly distinguishable since there the claimant did not, as with Maniaci, actually twice gain interim employment; nor did that case show that the claimant was discharged from one interim job, through no fault of her own.

ORDER[5]

Upon the basis of the foregoing findings and conclusions, it is hereby ordered that the Respondent, the Westin Hotels Corporation d/b/a The Westin Hotel, Detroit, Michigan, its officers, agents, successors, and assigns, shall pay to Lee Ann Maniaci the sum of $8,020.57[6] together with interest on that sum in the manner provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and in *Florida Steel Corp.*, 231 NLRB 615.[7]

[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In view of the stipulation that the backpay period ended on March 17, 1980, rather than March 30, 1980, I have diminished net backpay for the first quarter of 1980 (schedule F of the backpay specification) from $587.50 by two-thirteenths or $93.90 to a balance of $8,020.67 rather than the originally asserted $8,114.57.

[7] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962.)